Supreme Court, U.S.
FILED
JAN 24 1994
OFFICE OF THE CLERK

PETITION NO. 93-1076

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

CHRISTINE WRIGHT,	:	
	:	
Petitioner,	:	
	:	
v.	:	PETITION
	:	NO. 93-1076
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREEN, M.D. and CHRISTOPHER WALLS, M.D.,	:	
	:	
Respondents.	:	

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF RESPONDENTS JOHN K. SCHELLACK, M.D. AND M. EDWYN HARRISON, III, M.D. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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John K. Schellack, M.D. and
M. Edwyn Harrison, III, M.D.

QUESTIONS PRESENTED FOR REVIEW

The Respondents disagree with the Petitioner's statement of the questions for review, as there is no substantive federal question to be reviewed by this Court. The Petitioner never properly presented a constitutional issue to the Georgia trial or appellate courts, and therefore those courts never ruled on any such question. As such, there is no federal question for this Court to review.

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I. STATEMENT OF JURISDICTION

This Court should not accept jurisdiction of this appeal as it does not involve an important question of federal law which has not been, but should be, settled by this Court, nor does it involve a federal question decided by the Georgia courts in a way that conflicts with the applicable decisions of this Court. *See* Sup. Ct. R. 10.1(c). This Court lacks jurisdiction to review the judgment below because the Petitioner failed to timely or properly raise the questions sought to be reviewed in the Georgia courts and the Georgia courts therefore did not rule on the issues. *See Ellis v. Dixon*, 349 U.S. 458, 75 S. Ct. 850, 99 L.Ed. 1231 (1955).

II. STATEMENT OF THE CASE

The Petitioner filed this medical malpractice action in the Superior Court of Fulton County, Georgia on June 27, 1991, against John K. Schellack, M.D. ("Dr. Schellack"), M. Edwyn Harrison, III, M.D. ("Dr. Harrison"), numerous other doctors, and Crawford Long Hospital of Emory University in Atlanta, Georgia. In her complaint, the Petitioner alleged that the Respondents left a wire used during the insertion of a central line catheter in her body.

Under Georgia law, a plaintiff who files an action alleging medical malpractice must file with the complaint an affidavit of an expert competent to testify setting forth at least one negligent act against each defendant and the factual basis for each such claim of negligence. O.C.G.A. § 9-11-9.1(a) (1993). An exception to this procedural requirement arises when the plaintiff alleges that the statute of limitations will expire within ten days of the filing of the complaint and that,

because of such time constraints, an affidavit could not be obtained. In such cases, the statute grants the plaintiff an additional 45 days from the filing of the complaint in which to file the affidavit. O.C.G.A. § 9-11-9.1(b).[1]

Here, the Petitioner did not attach to her original complaint filed on June 27, 1991, an affidavit of an expert specifically alleging that either Dr. Schellack or Dr. Harrison negligently treated the Petitioner or the factual basis for any such claim of negligence. Rather, the Petitioner attached the deposition testimony of another physician taken in an unrelated case pending in Michigan. The Petitioner did not allege in the complaint that she could not obtain an expert affidavit because of time constraints due to the running of the statute of limitations, apparently because she thought the deposition testimony was sufficient.

In an amendment to the complaint filed on July 1, 1991, the Petitioner alleged for the first time that the statute of limitations would expire within ten days of the filing the complaint and she therefore could not obtain the requisite expert's affidavit. On August 7, 1991, the Petitioner filed a second amendment to the complaint, attaching the affidavit of yet another physician.

In their answers to the complaint, both Dr. Schellack and Dr. Harrison specifically raised the defense of the Petitioner's failure to comply with the requirements of O.C.G.A. § 9-11-9.1. On August 1, 1991, Dr. Schellack filed a

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[1] The entire text of O.C.G.A. § 9-11-9.1 (1993) is set out in the Appendix at page J-1.

motion to dismiss the complaint for failure to comply with the statute. Dr. Harrison filed a similar motion on September 18, 1991.[2]

The Petitioner filed a response to Dr. Schellack's motion to dismiss on September 3, 1991. The response stated no federal or state constitutional challenge to O.C.G.A. § 9-11-9.1, the Georgia Constitution, or any other Georgia statute or rule. (*See* Appendix H.) The Honorable Joel J. Fryer of the Superior Court of Fulton County, Georgia heard oral arguments on September 4, 1991. The Petitioner failed to appear and, thus, raised no constitutional issue at the hearing.

On September 11, 1991, seven days after the hearing on the motion to dismiss, the Petitioner for the first time raised a constitutional challenge to O.C.G.A. § 9-11-9.1 by way of a supplemental brief. (*See* Appendix I.) The trial court issued the written order reflecting its decision on September 13, 1991, dismissing the Petitioner's case in its entirety for failure to comply with O.C.G.A. § 9-11-9.1. The trial court did not rule on the Petitioner's untimely constitutional challenge. (*See* Appendix G.)

Notwithstanding her failure to raise any constitutional challenges in the trial court, the Petitioner appealed to the Georgia Supreme Court. The Georgia Supreme Court determined that it had no jurisdiction to hear the appeal as evidenced

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[2] The motion to dismiss was initially filed only on behalf of Dr. Schellack. The undersigned was subsequently retained to represent Dr. Harrison and filed a similar motion on his behalf. The trial court's order dismissing the complaint applied to all of the defendants.

by its February 12, 1992, order transferring the case to the Georgia Court of Appeals. (*See* Appendix E.) On February 25, 1992, the Petitioner filed a motion for reconsideration in the Georgia Supreme Court, again alleging that O.C.G.A. § 9-11-9.1 was unconstitutional. On March 12, 1992, the Supreme Court issued an order denying the motion for reconsideration. (*See* Appendix F.)

The Petitioner filed her brief in the Georgia Court of Appeals on March 4, 1992, alleging that the trial court inappropriately interpreted O.C.G.A. § 9-11-9.1 and improperly dismissed her complaint. She again made various constitutional attacks on O.C.G.A. § 9-11-9.1. In its decision dated September 8, 1992, the Georgia Court of Appeals affirmed the ruling of the trial court, holding that the trial court correctly applied O.C.G.A. § 9-11-9.1 and properly dismissed the Petitioner's complaint for failure to comply with that statute. (*See* Appendix C.) The Court of Appeals further stated:

> Since the trial court did not rule on [Petitioner's] contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. *In re Parrott*, 194 Ga. App. 856 (392 SE2d 48) (1990).

(*See* Appendix C at p. C-5.)

The Georgia Court of Appeals denied the Petitioner's motion for reconsideration of its decision on October 1, 1992. (*See* Appendix D.) The Petitioner subsequently filed a petition for certiorari to the Georgia Supreme Court, again raising constitutional challenges to O.C.G.A. § 9-11-9.1. The Georgia Supreme Court denied the petition for certiorari on

September 8, 1993, and denied the subsequent motion for reconsideration on October 1, 1993. (*See* Appendices A and B.)

The Petitioner now seeks a writ of certiorari from this Court, contending that the Georgia courts erred in some fashion by not ruling on the constitutional issues when, in fact, those issues were never properly raised in nor ruled upon by the Georgia trial or appellate courts. Her petition for certiorari should therefore be denied.

III. SUMMARY OF THE ARGUMENT

This Court should deny the petition for certiorari because there is no substantive federal question to be reviewed. The issues sought to be reviewed by the Petitioner were never presented to the Georgia courts, and the Georgia courts therefore never decided any of the issues set forth in the petition. This Court has no power to consider questions not preserved for appeal. *Street v. New York*, 394 U.S. 576, 581-82, 89 S. Ct. 1354, 22 L.Ed.2d 572 (1969).

This Court should further deny the petition because the Petitioner has failed to comply with Supreme Court Rule 14.5 requiring a petitioner to provide a clear and accurate presentation of the material necessary for this Court's review of the issues. The petition is neither clear nor accurate. Rather, it is incoherent. The petition should accordingly be denied on this ground as well.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. This Court Should Deny the Petition For Certiorari Because the Petitioner Never Presented and the State Courts Never Ruled On Any Federal or State Constitutional Issue and There Is No Federal Question For This Court to Review.

28 U.S.C.A. § 1257 (1993) provides the basis for this Court's jurisdiction when a petition for a writ of certiorari seeks review of the decision of a state court. That statute provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C.A. § 1257(a).

Rule 10 of the Supreme Court Rules expands on this jurisdictional requirement and lists considerations governing this Court's review on a writ of certiorari. That rule provides that a petition for a writ of certiorari shall be granted only

when there are "special and important reasons therefor." Sup. Ct. R. 10.1. Rule 10 sets out the reasons that will be considered in reviewing a petition, including:

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1(b), (c).

This petition satisfies none of these requirements. Here, the "federal question" sought to be reviewed by the Petitioner is the validity of the Georgia Constitution and the Georgia expert affidavit statute, O.C.G.A. § 9-11-9.1. In order for this Court to exercise its jurisdiction under 28 U.S.C.A. § 1257, however, the Court must first determine whether the federal question was even presented to the Georgia courts in such a manner that it was necessarily decided by them. "If the question was not so presented, then [this Court has] no power to consider it." *Street v. New York*, 394 U.S. 576, 582, 89 S. Ct. 1354, 22 L.Ed.2d 572 (1969). *See also Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S. Ct. 66, 90 L.Ed.2d 3 (1945); 28 U.S.C.A. § 1257(a).

In this case, the Georgia trial and appellate courts did not decide any federal question because none was properly presented for review. As the Court can determine from the materials set out in the Appendix, the Petitioner did not raise a constitutional challenge to O.C.G.A. § 9-11-9.1 until *after* the hearing on the motion to dismiss. Although much of the petition for certiorari is incomprehensible, the Petitioner herself admits that she raised a constitutional challenge to the Georgia statute for the first time in the supplemental brief filed in the trial court seven days after oral argument and just two days before the trial court issued its written order. (*See* Petition for Certiorari, p. 8.) The Petitioner *never* made a constitutional challenge, either state or federal, at any other time during the proceedings. The trial court accordingly did not rule upon the issue. (*See* Appendix G.)

The Georgia Supreme Court confirmed that the constitutional issue was not properly preserved as evidenced by its transfer of the Petitioner's appeal to the Georgia Court of Appeals for lack of jurisdiction. (*See* Appendix E.) Likewise, the Georgia Court of Appeals ruled that the constitutional challenges raised by the Petitioner presented nothing for appellate review because the trial court did not rule on those contentions. (*See* Appendix C at p. C-5.) The Georgia Supreme Court again confirmed that this appeal presented no constitutional issues for review by denying the petition for certiorari as well as the subsequent motion for reconsideration. (*See* Appendices A and B.)

In sum, the Petitioner cannot now be heard to argue that this Court should grant her a writ of certiorari when she failed to properly preserve, present, or argue those questions in the Georgia courts. Her petition should accordingly be denied.

B. This Court Should Deny the Petition for Certiorari Because It Does Not Comply With This Court's Rules.

Supreme Court Rule 14.5 provides:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

See also Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 509, 44 S. Ct. 164, 68 L.Ed. 413 (1924) (dismissing writ of certiorari as improvidently granted and pointing out the need for clear, definite and complete disclosure of the controversy when applying for certiorari).

There is nothing accurate, brief, or clear about the petition for certiorari filed in this case. Indeed, it is incomprehensible. It is impossible to determine from the Petitioner's brief exactly what is in controversy and, for this reason alone, the petition should be denied.

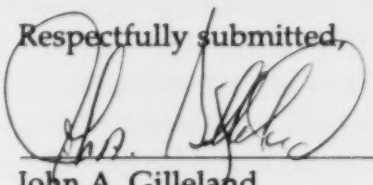
This is not the first time the Petitioner has failed to follow procedural rules. The underlying appeal was based on the Petitioner's failure to comply with a Georgia statute, O.C.G.A. § 9-11-9.1. The Petitioner also failed to comply with the procedural rules of the Georgia Court of Appeals regarding the time for filing motions for reconsideration. She repeatedly ignored the rules of the Georgia courts regarding serving opposing counsel with copies of her briefs, motions, and other pleadings.

As evidenced by her own petition, she has now failed to comply with the procedural rules of this Court. Her statement of the case is anything but concise, despite the mandate of Supreme Court Rule 14.1(g). She ignored the requirement of Rule 14.1(h) that she specify how the federal questions sought to be reviewed were raised in the state court. Finally, as discussed above, her petition is anything but clear and concise, as required by Rules 14.1(j) and 14.5. Her petition should be denied because of her failure to comply with the procedural rules of this Court and her apparent inability to present the issues sought to be reviewed in any coherent or clear manner.

V. CONCLUSION

For all of the above reasons, the Respondents John K. Schellack, M.D. and M. Edwyn Harrison, III, M.D. respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,



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PETITION NO. 93-1076

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CHRISTINE WRIGHT,	:	
	:	
Petitioner,	:	
	:	
v.	:	PETITION
	:	NO. 93-1076
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CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREEN, M.D. and CHRISTOPHER WALLS, M.D.,	:	
	:	
Respondents.	:	

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all interested parties to this action with the Brief of Respondents John K. Schellack, M.D. and M. Edwyn Harrison, III, M.D. in Opposition to Petition for Writ of Certiorari by depositing three copies of same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to:

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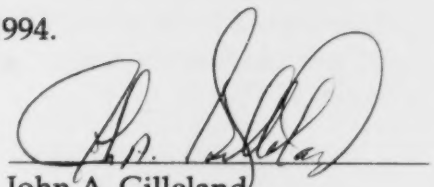
This 24th day of January, 1994.



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APPENDIX

APPENDIX A

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA
DATE: SEPTEMBER 08, 1993

Traci Green
LOVE AND WILLINGHAM
Suite 5050, One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309

Case No. S93C0114
CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

COURT OF APPEALS CASE NO. A92A0964

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt, P.J., and Carley, J., who dissent.

Sincerely,

Sherie M. Welch, Clerk

APPENDIX B

SUPREME COURT OF GEORGIA
ATLANTA OCTOBER 01, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93CO114

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

APPENDIX C

FIRST DIVISION
SOGNIER, C.J.
MCMURRAY, P.J., COOPER, J.
DATED: SEPTEMBER 08, 1992

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 48, March 1, 1985)

In the Court of Appeals of Georgia

A92A0964. WRIGHT v. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY et al. S-63

SOGNIER, Chief Judge.

Christine Wright brought a medical malpractice claim against Crawford Long Hospital and six physicians. Her complaint, as amended, was dismissed for noncompliance with OCGA § 9-11-9.1, and she appeals.

In her complaint appellant alleged that defendants were liable for damages she incurred when an introducer wire was left in her body during catheterization procedures performed in July 1989. Appellant attached to her complaint the deposition of Dr. Pamela Benitez, the surgeon who discovered and removed the wire in December 1989. In this deposition, which was

given in a Michigan lawsuit, Dr. Benitez testified that leaving a broken catheter threader wire in a patient's body violated the applicable standard of care. However, Dr. Benitez also stated that the wire she removed was not the kind of wire used to thread a catheterization line and that she did not recognize the type of wire and was unable to identify a medical procedure in which such a wire would be used. In addition, Dr. Benitez testified that she had not reviewed appellant's medical records pertaining to the procedures performed by appellees and did not know the names of appellant's Georgia physicians.

Four days after filing her complaint, appellant amended it to allege that the statute of limitation would expire within ten days of filing and that because of this time constraint she was unable to obtain the required affidavit before filing the complaint. Appellees raised the issue of noncompliance with OCGA § 9-11-9.1 in their answers and motions to dismiss. In her second amendment to the complaint, filed 41 days after the complaint was filed, appellant attached the affidavit of Dr. Jose Evangelista, who averred that he had reviewed the records of appellees' treatment of appellant and had determined that appellees were negligent in failing to remove a catheter guide wire and in failing to so inform appellant. The trail court dismissed the complaint on the basis that Dr. Benitez's deposition testimony did not satisfy the requirements of OCGA § 9-11-9.1 (a) and that appellant could not amend the action to add Dr. Evangelista's affidavit because the original complaint did not include the language required by OCGA § 9-11-9.1 (b).

1. Contrary to appellant's contentions, the deposition did not meet the requirement of "set[ting] forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim," OCGA § 9-11-9.1 (a), as Dr. Benitez did not identify any negligent act committed by appellees and was unable even to speculate as to the source of the wire. See *Piedmont Hospital, Inc. v. Milton*, 189 Ga. App. 563, 564 (377 SE2d 198) (1988). Thus, the complaint as originally filed was subject to dismissal for noncompliance with OCGA § 9-11-9.1

2. Alternatively, appellant contends she properly amended her complaint under either OCGA § 9-11-9.1 (b) or (c). The statute permits amendment of a complaint to add the required affidavit only in limited circumstances: (1) if the statute of limitation will expire within ten days and the plaintiff alleges that an expert affidavit could not be prepared because of time constraints (OCGA § 9-11-9.1 (b)); or (2) if the court determines that the plaintiff had the requisite affidavit available before the complaint was filed and the failure to file "was the result of a mistake" (id. at (e)). Paragraph (e) does not apply because Dr. Evangelista's affidavit was dated after suit was filed, and appellant does not contend the affidavit was available prior to filing. See *Cheeley v. Henderson*, 261 Ga. 498 (3) (405 SE2d 865) (3) (1991); compare *Hospital Authority of Fulton County v. McDaniel*, 192 Ga. App. 398 (385 SE2d 8) (1989). Paragraph (b) likewise is inapplicable because appellant did not allege in her original complaint that she was unable to obtain an affidavit because of time

constraints, but instead alleged that the requisite affidavit — the deposition of Dr. Benitez — was attached to and filed with the complaint, but the deposition was insufficient.

Appellant maintains that under the liberal amendment provisions of OCGA § 9-11-15, she was entitled to amend her complaint to add the allegations required by OCGA § 9-11-9.1 (b) and then to file a second amendment to add the affidavit as contemplated by paragraph (b). We disagree, for in *Cheeley*, supra, the Supreme Court held that the contemporaneous filing requirement is mandatory and that the filing of an insufficient affidavit cannot be cured by amendment unless the requirements of paragraph (e) are met. As the court noted, paragraph (e) expressly states that the failure to comply with the contemporaneous filing requirement cannot be cured by amendment under OCGA § 9-11-15 unless the affidavit was available prior to the filing of the complaint but was not filed due to a mistake. *Cheeley*, supra at 499. The legislature clearly has limited the manner in which OCGA § 9-11-15 is applied in malpractice cases and has authorized amendment only in certain limited circumstances not present here.

Although this court reached a contrary result in *Thompson v. Long*, 201 Ga. App. 480 (411 SE2d 322) (1991), that case involved a pro se plaintiff and applied the less stringent pleading standard used in pro se cases but not applicable here. Moreover, the *Thompson* plaintiff clearly had intended from the outset to proceed under paragraph (b) — i.e., to file the complaint just

before the statute of limitation expired and then to obtain and file the affidavit thereafter — but neglected to add the "magic language" in her pleading, id. at 482, whereas here appellant originally filed a deposition she alleged met the requirements of paragraph (a). Thus, this case, like *Cheeley*, "involves the misinterpretation of OCGA § 9-11-9.1 (a). Because of the misinterpretation, the requisite affidavit [filed with the complaint] failed to comply with OCGA § 9-11.9.1a." (Punctuation and citation omitted.) *Cheeley*, supra at 49[illegible] (3). Accordingly, the trial court properly granted appellees' motions to dismiss.

3. Since the trial court did not rule on appellant's contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. In re Parrott, 194 Ga. App. 856 (392 SE2d 48) (1990).

Judgment affirmed. McMurray, P.J., and Cooper, J., concur.

APPENDIX D

COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA, OCTOBER 01, 1992

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A92A0964

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF
THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA
DATED: OCTOBER 01, 1992

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,
Victoria McLaughlin

APPENDIX E

CASE NO. S92A0520

SUPREME COURT OF GEORGIA
ATLANTA FEBRUARY 12, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

From the SUPERIOR COURT of FULTON County.

There being no basis for jurisdiction in this Court, it is ordered that this appeal be hereby transferred to the Court of Appeals. Clarke, C.J., Weltner, P.J., Bell, Hunt, Benham, Fletcher, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year list above written.

Lynn M. Stinchcomb, Deputy Clerk

APPENDIX F

SUPREME COURT OF GEORGIA
ATLANTA MARCH 12, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S92A0520

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk

APPENDIX G

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	FILE NO. D-90848
vs.	:	
	:	
CRAWFORD LONG HOSPITAL	:	
OF EMORY UNIVERSITY,	:	
JOHN K. SCHELLACK, M.D.,	:	
CHRISTOPHER DOOLEY, M.D.,	:	
M. EDWYN HARRISON, III,	:	
M.D., WILLIAM A. DAVIS, M.D.,	:	
DAVID GREEN, M.D. and	:	
CHRISTOPHER WALLS, M.D.,	:	
	:	
Defendants.	:	

ORDER

Upon full consideration of the record, Defendants' Motion to Dismiss is hereby GRANTED.

Plaintiff filed this medical malpractice action against Crawford Long Hospital as well as six doctors alleging that the Defendants failed to remove an introducer wire used during the insertion of a central line catheter in Plaintiff's body on July 4, 1989. The Plaintiff

filed with her Complaint a deposition of Pamela Benitez, M.D., however, the Complaint did not include the expert affidavit required by O.C.G.A. § 9-11-9.1(a). Neither did the Plaintiff's Complaint allege that due to time constraints an expert affidavit could not be prepared and that Plaintiff would need the extra 45 days permitted by O.C.G.A. § 9-11-9.1(b).

On July 1, 1991, in an attempt to comply with the O.C.G.A. § 9-11-9.1 requirement, the Plaintiff filed an amended Complaint stating that due to time constraints an expert affidavit could not be prepared and filed contemporaneously with the Complaint. On August, 7, 1991, a second amended Complaint was filed with the required expert affidavit attached.

We have no choice but to dismiss this Complaint for failure to fulfill the contemporaneous filing requirements. Under O.C.G.A. § 9-11-9.1(e) Plaintiff's first and second amendments to the original Complaint cannot cure this defect.

Plaintiff responds to this Motion to dismiss by contending that first, the statute does not by its terms require a contemporaneous allegation of unavailability and second, the deposition attached to the original Complaint was sufficient to satisfy the requirements of O.C.G.A. § 9-11-9.1. With both these contentions we disagree.

Section b of O.C.G.A. 9-11-9.1 states, "The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which

the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared." The language of the statute reads very clearly. The requirement that the Plaintiff allege that time constraints have prevented the contemporaneous filing of an affidavit with the Complaint is mandatory, not permissive.

The Plaintiff's contention that the deposition attached to the original Complaint was sufficient to satisfy the affidavit requirements of O.C.G.A. § 9-11-9.1 must also fail. O.C.G.A. § 9-11-9.1(a) states, "In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."

The deposition attached to Plaintiff's original Complaint does not set forth the factual basis for the claim of malpractice. In fact, the deposition never mentions the particular Defendants involved in this case, let alone the acts of negligence they are alleged to have performed. The deposition of Dr. Benitez merely states that an introducer wire was left in the Plaintiff's body and that failure to remove this wire in a patient upon withdrawal of a CVP line violates the standard of care generally accepted in the community. Dr. Benitez never states that she has reviewed the work performed by the particular Defendants in this matter and that their acts or failure to act fell below the

standard of care generally accepted in the community. Allowing this particular deposition to fulfill the requirements of O.C.G.A. 9-11-9.1 would undermine the public policy of the statute which is "to require the plaintiff to 'set forth the particulars of the claim'" in order to prevent frivolous or unsustainable malpractice actions. (cits.) *Cheeley v. Henderson*, 197 Ga. App. 543 (1990) reversed on other grounds, _____ Ga. _____ (1991).

We therefore GRANT the Defendant's Motion for Summary Judgment and DISMISS the Plaintiff's Complaint for failure to comply with O.C.G.A. § 9-11-9.1.

This 13th day of SEPTEMBER, 1991.

JOEL J. FRYER
JUDGE, FULTON SUPERIOR COURT, A.J.C.

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APPENDIX H

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	FILE NO.: D-90848
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. AND CHRISTOPHER WALLS, M.D.	:	

PLAINTIFF'S RESPONSE TO DEFENDANT SCHELLACK'S MOTION TO DISMISS

COMES NOW CHRISTINE WRIGHT, Plaintiff in the above captioned matter and herewith responds to Defendant's Motion to Dismiss as follows:

STATEMENT OF FACT:

This is a medical malpractice action which was filed on June 27, 1991. In the Complaint as originally

filed Plaintiff did not allege her inability to attach an expert's affidavit in accordance with OCGA 9-11-9.1(b).

By amendment dated June 28, 1991, and filed in office on July 1, 1991, Plaintiff set out her allegations in accordance with OCGA 9-11-9.1(b).

Within 45 days of the date of filing of the original Complaint, Plaintiff supplemented her Complaint in accordance with OCGA 9-11-9.1(b), by filing the affidavit of Jose L. Evangelista, M.D.

Defendant Schellack was served with Summons and Complaint on July 1, 1991. He filed his answer on August 2, 1991. Plaintiff was served with Schellack's Motion to Dismiss on August 5, 1991.

ARGUMENT AND CITATION OF AUTHORITY:

The gravamen of Defendant's Motion to Dismiss is found at page 4 of his brief. There Defendant states "...the failure to either file an expert's affidavit contemporaneously with the original Complaint or to allege in the original Complaint the need for additional time is a defect [sic] which can not be cured by amendment." (emphasis added).

Defendant's assertion does not accurately set out the requirements contained in OCGA 9-11-9.1(b). The statute states: "...The contemporaneous filing requirements of subsection (a) of this Code section shall not apply to any case in which the period of limitation will

expire within ten days of the date of filing and, because of such time constraints, the Plaintiff has alleged that an affidavit of an expert could not be prepared." The statute then goes on to set out the time requirement for supplementation of the pleadings with the affidavit.

Plaintiff suggests, with all due respect, that the Defendant has engrafted onto the statute a requirement that simply is not there. The statute talks in terms of a "contemporaneous filing requirement" with reference to the expert's affidavit itself. The statute does not by its terms require a "contemporaneous allegation" of unavailability. The statute merely requires that the Plaintiff allege the operative circumstances described in subsection (b) regarding the unavailability of the affidavit.

Here, Plaintiff has made no effort to amend an expert's affidavit. Nor has she amended to add an affidavit. Rather, Plaintiff amended her Complaint to set out those exigent statutory circumstances which would permit her to later supplement her Complaint as originally filed. Under these circumstances, Plaintiff respectfully suggests that OCGA 9-11-15 is applicable and that her amendment would relate back to the date of the original Complaint. Defendant's Motion should, therefore, be denied.

The Defendant further contends that the deposition attached to the complaint as Exhibit A was not sufficient to satisfy the requirements of OCGA 9-11-9.1. This position is also unsound.

Defendant does not contend that a deposition cannot be used in place of an affidavit. Nor can he. *See, e.g., Hospital Authority of Fulton County v. McDaniel*, 192 Ga. App. 398, 385 SE2d 8 (1989). As the Court stated in McDaniel: "The purpose of the Code requirement is to ensure a substantial basis for actions against professionals." 385 SE2d at 9. Plaintiff suggests that the Benitez deposition does show a "substantial basis" for this suit.

The deposition shows the following: Dr. Benitez is a board certified surgeon licensed to practice medicine in Michigan (pp. 6-7); She first saw the plaintiff on November 13, 1987 at Wayne State University, University Surgeons (p. 10); On November 13, 1987, a chest x-ray was performed which did not show the presence of a foreign object in Plaintiff's right subclavicular fossa (pp. 25-6); X-rays of Plaintiff's chest were taken on January 26, 1988, which did not show the presence of a foreign object in Plaintiff's right subclavicular fossa (pp. 34-5); X-rays taken on April 29, 1988 did not show the foreign body but would have had it existed at that time (p. 37); On December 13, 1989, She performed surgery on the Plaintiff to remove a 50 cm metal wire from Plaintiff's right subclavicular fossa (pp. 11-2); In her opinion the wire got into Plaintiff's body after November 13, 1987 (p. 27); Plaintiff was treated during that time at Wayne State University and at a hospital in Georgia (p. 27, p. 29, p. 40); As far as she knew, no invasive procedures were performed at Wayne State University (p. 27); It would violate the standard of care to leave a threader wire in a patient (p. 39);

"The purpose of OCGA 9-11-9.1 is to reduce the number of frivolous malpractice suits being filed, not to require a plaintiff to prove a prima facie case entitling him to recover... ." *0-1 Doctors Memorial Holding Co. v. Moore*, 190 Ga. App. 286, 378 SE2d 708, 710 (1989). Given this benchmark, Plaintiff respectfully suggests that the deposition of Dr. Benitez complies with, at least, the spirit of OCGA 9-11-9.1.

For the foregoing reasons, Plaintiff suggests that Defendant's motion has no merit and should be denied.

This the 2nd day of September, 1991.

SILER & JONAP
Attorneys for Plaintiff

BY: William A. Dinges
Georgia Bar No.: 222575

P.O. Box 49006
Atlanta, Georgia 30359-1006
(404) 321-1000

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	FILE NO.: D-90848
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. AND CHRISTOPHER WALLS, M.D.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have this date served true and correct copies of the foregoing upon:

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by affixing sufficient first class postage to same and depositing same in the United States mail.

This the 2nd day of September, 1991.

SILER & JONAP
Attorneys for Plaintiff

BY: William A. Dinges
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APPENDIX I

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	FILE NO.: D-90848
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. AND CHRISTOPHER WALLS, M.D.	:	
	:	
Defendants.	:	

PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANT SCHELLACK'S MOTION TO DISMISS

COMES NOW CHRISTINE WRIGHT, Plaintiff in the above-captioned matter, and herewith supplements her Response to Defendant Schellack's Motion to Dismiss as follows:

This matter was set for oral argument on September 4, 1991, but because of calendar conflicts, the undersigned was committed to appear before Judge Robins in DeKalb State Court on another motion as set out in his conflict letter. It was agreed to submit the motion to the Court on briefs.

ARGUMENT AND CITATION OF AUTHORITY:

In addition to the reasons set out in her original response, Plaintiff suggests that Defendant's motion should be denied because the basis of the motion, OCGA 9-11-9.1., is unconstitutional.

The Constitution of the State of Georgia, Art. II, Sec. V, Par. III, states: "No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof."

The purpose of this constitutional provision is to protect against surprise legislation. *Mead Corp. v. Collins*, 258 Ga. 239, 367 SE2d 790 (1988). OCGA 9-11-9.1 totally fails in this regard. The statute by its terms refers only to the affidavit filing requirement. The statute does not warn of the dire substantive consequences which result from the failure to follow the requirements exactly.

Further, Plaintiff suggests that the language of the statute is so vague that persons of ordinary intelligence are forced to guess at its meaning. Such guesswork is at that persons' peril. Any defects in the affidavit are not amenable and, thus, the effects of the statute become

capricious and arbitrary. A plaintiff who guesses wrong would be irrevocably out of court. Certainly this violates all notions of fair play and substantial justice.

For the foregoing additional reasons Plaintiff respectfully suggests that Defendant's motion should be dismissed.

This the 11th day of September, 1991.

SILER & JONAP
Attorneys for Plaintiff

BY: William A. Dinges
Georgia Bar No.: 222575

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have this date served true and correct copies of the foregoing upon:

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by affixing sufficient first class postage to same and depositing same in the United States mail.

This the 11th day of September, 1991.

SILER & JONAP
Attorneys for Plaintiff

BY: William A. Dinges
Georgia State Bar No.: 222575

APPENDIX J

O.C.G.A. § 9-11-9.1. Affidavit to accompany charge of professional malpractice.

(a) In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires.

(c) If an affidavit is filed after the filing of a complaint, as allowed under subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.

(d) This Code section shall not be construed to extend any applicable period of limitation.

(e) Except as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this Code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake. (Code 1981, § 9-11-9.1, enacted by Ga. L. 1987, § 3; Ga. L. 1989, p. 419, § 3.)

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JAN 26 1994
CLERK OF THE SUPREME

(3)

No. 93-1076

In The

Supreme Court of the United States

October Term, 1993

FRANKLIN M. WRIGHT,
Administrator of the Estate of
CHRISTINE WRIGHT, *Deceased,*

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., DAVID A. DAVIS, M.D., DAVID GREENE, M.D. and CHRISTOPHER WALLS, M.D.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, CHRISTOPHER DOOLEY, M.D. AND CHRISTOPHER WALLS, M.D.

John M. Hudgins IV, P.C.
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Attorneys for Respondents
Crawford Long Hospital of Emory University, Christopher Dooley, M.D. and Christopher Walls, M.D.

14 pp

I. QUESTIONS PRESENTED

1. Whether Petitioner failed to timely and properly raise constitutional questions in the Georgia state court system?

2. Whether O.C.G.A. § 9-11-9.1 is constitutional?

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IV. STATEMENT OF JURISDICTION

Respondents show that Petitioner has failed to properly invoke this Court's jurisdiction. Petitioner has not timely and properly raised a state or federal constitutional question in the Superior Court of Fulton County, State of Georgia, the Georgia Court of Appeals or the Georgia Supreme Court. *See* App. pp. A1-A7, B1-B2, C9 of Petition For Writ Of Certiorari (hereinafter "Petition"). Additionally, Petitioner has not cited any statutory provision conferring jurisdiction on this Court in his Petition as required by Rule 14.1(e)(iv) of the Rules of the Supreme Court.

V. STATEMENT OF THE CASE

On June 27, 1991, Christine Wright filed this medical malpractice action in the Superior Court of Fulton County, Georgia. On August 1, 1991, Respondent John K. Schellack, M.D. filed his Motion to Dismiss the Complaint for Petitioner's failure to comply with O.C.G.A. § 9-11-9.1. On September 13, 1993, an Order granting the Motion to Dismiss was entered in the Superior Court of Fulton County, Georgia. App. pp. A1-A7 of Petition.

On October 2, 1991, Petitioner filed a Notice of Appeal to the Georgia Supreme Court. The Georgia Supreme Court found there was no basis for original jurisdiction in the Georgia Supreme Court because no constitutional issues were properly raised in the appeal. As a result, on February 2, 1992, the case was transferred to the Georgia Court of Appeals. App. p. B1-B2 of Petition. On February 21, 1992, Petitioner filed a Motion for Reconsideration with the Georgia Supreme Court of its order transferring the case to the Georgia Court of Appeals. On March 12, 1992, the Georgia Supreme Court denied that Motion for Reconsideration.

In the Georgia Court of Appeals, Petitioner argued, *for the first time,* that O.C.G.A. § 9-11-9.1 violates the equal protection and due process clauses of the Georgia and United States Constitutions. On September 8, 1992, the Georgia Court of Appeals affirmed the trial court's order dismissing Petitioner's Complaint for the failure to comply with the provisions of O.C.G.A. § 9-11-9.1. App. pp. C1-C9 of Petition. In its opinion, the Georgia Court of Appeals noted that Petitioner's contentions that O.C.G.A. § 9-11-9.1 is unconstitutional were not properly raised in the appeal. App. p. C9 of Petition. On September 24, 1992, Petitioner filed an untimely Motion for Reconsideration of the Georgia Court of Appeals' decision. That untimely Motion for Reconsideration was denied on October 1, 1992.

On October 20, 1992, Petitioner filed a Petition for Certiorari in the Georgia Supreme Court. On September 8, 1993, that

Petition for Certiorari was denied. App. p. D1 of Petition. On September 17, 1993, Petitioner filed a Motion for Reconsideration of the denial of the Petition for Certiorari. That Motion for Reconsideration was denied on October 1, 1993. App. pp. E1-E2 of Petition. Thereafter, on December 29, 1993, Petitioner filed this Petition for Writ of Certiorari.

VI. SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because Petitioner has failed to timely and properly raise any issue with regard to the constitutionality of O.C.G.A. § 9-11-9.1. Petitioner's arguments that O.C.G.A. § 9-11-9.1 is unconstitutional were not ruled upon by the Superior Court of Fulton County, Georgia or either of the Georgia appellate courts. Since the Georgia Supreme Court has not been afforded the opportunity to decide a federal or state constitutional issue, this Court is without jurisdiction to consider these issues.

This Petition for Certiorari should also be denied because O.C.G.A. § 9-11-9.1 is constitutional. O.C.G.A. § 9-11-9.1 was enacted for the legitimate purpose of reducing frivolous professional malpractice actions in Georgia. Moreover, the requirements of O.C.G.A. § 9-11-9.1 are rationally related to this legitimate purpose.

VII. REASONS FOR DENYING THE PETITION

A. Petitioner failed to properly raise any federal issues in the Georgia courts.

The Georgia Supreme Court has consistently held that it will not consider the constitutionality of an act of the Georgia General Assembly unless it clearly appears that the constitutional issue was directly and properly raised in the trial court and distinctly passed on by the trial judge. *Ellett v. City of College Park*, 233 Ga. 858, 213 S.E.2d 700 (1975); *Phillips v. National Ben Franklin Ins. Co.*, 229 Ga. 258, 190 S.E.2d 916 (1972); *Campbell v.*

J.D. Jewell, Inc., 220 Ga. 400, 139 S.E.2d 161 (1964); *Calhoun v. State*, 211 Ga. 112, 84 S.E.2d 198 (1954); *Bentley v. Anderson-McGriff Hardware Co.*, 181 Ga. 813, 184 S.E. 297 (1935); *Herndon v. State*, 179 Ga. 597, 176 S.E. 620 (1934); *Griggs v. State*, 130 Ga. 16, 60 S.E. 103 (1908); and *Brown v. State*, 114 Ga. 60, 39 S.E. 873 (1901). Merely raising a constitutional issue, which is not distinctly passed upon in the trial court is insufficient to constitute a basis for appeal in the Georgia appellate courts. *Calhoun, supra; Herndon, supra.* Therefore, a constitutional issue which is either intentionally or unintentionally omitted by the trial court does not give rise to an appealable issue in Georgia. *Willingham v. Lee*, 227 Ga. 425, 181 S.E.2d 49 (1971).

It is clear from the trial court's order dismissing the Petitioner's Complaint for failing to comply with O.C.G.A. § 9-11-9.1 that the trial court did not rule on any constitutional issues. *See* App. pp. A1-A7 of Petition. Based upon the trial court's failure to rule on any constitutional issue, the Georgia Supreme Court found that it did not have jurisdiction over the appeal and transferred the case to the Georgia Court of Appeals. App. pp. B1-B2 of Petition. The Georgia Court of Appeals specifically refused to consider Petitioner's constitutional arguments, "[s]ince the trial court did not rule on [Petitioner's] contentions that O.C.G.A. § 9-11-9.1 is unconstitutional . . . ." App. p. C9 of Petition. Thus, it is clear from the actions, orders and opinions of the Georgia courts that Petitioner did not properly raise any constitutional issues.

This Court has steadfastly refused to consider constitutional issues that are not properly raised in the state court. *Webb v. Webb*, 451 U.S. 493 (1981); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Street v. New York*, 394 U.S. 576 (1969); *Carindale v. Louisiana*, 394 U.S. 437 (1969); and *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964). In *Webb, supra*, the petitioner sought an answer to the question of whether the United States Constitution demanded that Georgia give full faith and credit to a Florida custody decree. The petitioner in *Webb*, however, failed to raise the federal full faith and credit issue in the trial court and

the Georgia Supreme Court did not mention the federal question in its opinion. This Court noted that in such instances "it will be assumed that the omission was due to want of proper presentation in the state courts," unless it can be affirmatively demonstrated to the contrary. *Id.* at 495. Since the Georgia Supreme Court did not mention, let alone decide, the federal constitutional issue as required in order to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257, and the petitioner could not affirmatively demonstrate that the federal full faith and credit issue was in fact raised in the Georgia courts, this Court concluded it was without jurisdiction and dismissed the writ of certiorari. *Id.* at 501-2.

Similar to the situation in *Webb, supra,* this Petitioner failed to properly raise any constitutional issues while this case was pending in Georgia. Rather than not mentioning Petitioner's constitutional arguments, the Georgia Court of Appeals specifically noted Petitioner's failure to properly raise any constitutional issues. App. p. C9 of Petition. Since the Georgia appellate courts did not have the opportunity to review any constitutional issues in this case, this Court is without jurisdiction to consider the instant Petition for Writ of Certiorari. Accordingly, this Petition for Writ of Certiorari should be denied.

B. O.C.G.A. § 9-11-9.1 is constitutional.

O.C.G.A. § 9-11-9.1 requires a professional malpractice claimant to file the affidavit of an expert competent to testify along with a complaint for damages. The affidavit must specifically set forth at least one negligent act or omission claimed to exist and the factual basis for each such claim. O.C.G.A. § 9-11-9.1(a). The purpose of this requirement is to reduce the number of frivolous professional malpractice suits in Georgia. *Gadd v. Wilson & Co., Eng'rs & Architects,* 262 Ga. 234, 416 S.E.2d 285 (1992).

The requirement that professional malpractice claimants file an expert affidavit with their complaint does not violate Petitioner's equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution. Although there

are three levels of scrutiny in the equal protection analysis, the rational basis test applies to situations where a statute is challenged that differentiates between litigants. *See Boyd v. Bulala,* 877 F.2d 1191, 1197 (4th Cir. 1989); *Woods v. Holy Cross Hosp.,* 591 F.2d 1164, 1173 (5th Cir. 1979). In *Hoffman v. United States,* 767 F.2d 1431, 1436 (9th Cir. 1985), it was argued that a California statute limiting recovery for noneconomic damages in medical malpractice suits to $250,000.00 violated the equal protection clause of the federal constitution. Since the statute involved neither a suspect classification nor a fundamental right, the Ninth Circuit Court of Appeals concluded that the rational basis test was the appropriate level of scrutiny to apply in their equal protection analysis of the statute. *See also Allrid v. Emory Univ.,* 249 Ga. 35, 285 S.E.2d 521 (1982) (rational basis test applied to shorter statute of limitations for medical malpractice cases involving foreign objects and all other medical malpractice cases in Georgia); *Hamby v. Neurological Assocs., P.C.,* 243 Ga. 698, 256 S.E.2d 378 (1979) (rational basis test applied to shorter statute of limitations on loss of consortium claims in medical malpractice context and all other loss of consortium claims in Georgia).

The rational basis test requires that state statutes "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v Reed,* 404 U.S. 71 (1971). In *Hoffman, supra,* the California statute placing a ceiling on noneconomic damages in medical malpractice cases survived this rational basis analysis. The court held that the statute was reasonably related to the legitimate purposes of reducing malpractice insurance premiums and improving the quality of health care provided to the people of California. *Id.* at 1437. O.C.G.A. § 9-11-9.1 survives the rational basis test in a similar fashion. The requirement that an affidavit of an expert be filed with the complaint reasonably furthers the legitimate goal of reducing groundless malpractice lawsuits in Georgia by requiring that professional malpractice claimants have an expert examine their case before suit is filed. Accordingly, O.C.G.A. § 9-11-9.1 does not violate the equal

protection clause contained in the Fourteenth Amendment to the United States Constitution.

O.C.G.A. § 9-11-9.1 also does not violate Petitioner's due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. This Court has held that a state has broad power to enact procedural requirements with which a claimant must comply in order to take advantage of the adjudicatory process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Moreover, a state is not prevented from prescribing a reasonable and appropriate condition precedent to the proceeding of a lawsuit of a specified kind. *Jones v. Union Guano Co.*, 264 U.S. 171 (1924). In *Gronne v. Abrams*, 793 F.2d 74, 77 (2d Cir. 1986), a New York statute requiring submission of medical malpractice claims to a malpractice panel for a hearing on liability before proceeding to trial was challenged on due process grounds. The court concluded that the statute, by allowing the parties the opportunity to mediate a settlement, if warranted, was a reasonable legislative response to increasing malpractice rates and the eroding quality of health care provided to the residents of New York. Thus, the statute did not violate medical malpractice claimants' due process rights. *Id.* at 77-78.

O.C.G.A. § 9-11-9.1 is also a reasonable condition precedent to filing a medical malpractice lawsuit in Georgia. As demonstrated above, O.C.G.A. § 9-11-9.1, by requiring potential medical malpractice claimants to have an expert review their case prior to filing a lawsuit, is reasonably related to the legitimate object of decreasing the number of frivolous malpractice suits filed in Georgia. The reasonableness of this requirement is further demonstrated by the fact that Georgia law requires expert testimony for a professional malpractice claim to survive a motion for directed verdict at trial. *See Shea v. Phillips*, 213 Ga. 269, 98 S.E.2d 552 (1957); *Eberhart v. Morris Brown College*, 181 Ga. App. 516, 352 S.E.2d 832 (1987); and *Kenney v. Piedmont Hosp.*, 136 Ga. App. 660, 222 S.E.2d 162 (1975). Thus, O.C.G.A. § 9-11-9.1 is a reasonable condition precedent to filing a medical malpractice lawsuit in Georgia. Accordingly, O.C.G.A.

§ 9-11-9.1 does not violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Finally, Petitioner argues that the Georgia Constitution, and the manner in which it has been interpreted by the Georgia Supreme Court, is unconstitutional because it provides greater protections than, and is not subsidiary to, the United States Constitution. Petition, pp. 27-28. It is well settled, however, that states may interpret their constitutions to provide greater rights than the federal constitution. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975); *State v. Miller*, 260 Ga. 669, 398 S.E.2d 547 (1990); Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990), *cert. denied, Green v. Georgia*, ____ U.S. ____ (1991); *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989); *LoGiudice v. State*, 251 Ga. 711, 309 S.E.2d 355 n.6 (1983), *cert. denied, LoGiudice v. Georgia*, 466 U.S. 950 (1984); *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972). Thus, Petitioner's argument that "this case is ripe for judicial review" because the Georgia Supreme Court is providing greater protections to the citizens of Georgia than the federal constitution is illusory and without merit.

VIII. CONCLUSION

Petitioner failed properly raise any federal or state constitutional issues in the Georgia courts, and thus, this Petition for Writ of Certiorari should be denied. Additionally, O.C.G.A. § 9-11-9.1 does not violate the equal protection and due process clauses of the United States Constitution. For this additional reason, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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